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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RITA GARCIA, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

PRAXAIR, INC., a Delaware
corporation; PRAXAIR
DISTRIBUTION, INC., a Delaware
corporation; and DOES 1 through 10,
inclusive,

Defendants

Case No.: 2:18-cv-08170-JAK (AFMx)

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR FINAL
APPROVAL OF CLASS ACTION
AND PAGA ACTION SETTLEMENT
AND CERTIFICATION OF
SETTLEMENT CLASS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: January 11, 2021
Time: 8:30 a.m.
Courtroom: 10B
Judge: Hon. John A. Kronstadt

Action Filed: May 18, 2018
Trial date: Not set

1 TO THE COURT, TO ALL PARTIES, AND THEIR COUNSEL OF RECORD

2 Please take notice that on January 11, 2021, at 8:30 a.m., or as soon thereafter as
3 counsel may be heard, in the United States First Street Courthouse, 350 W. First Street,
4 Courtroom 10B, Los Angeles, CA 90012, Plaintiff RITA GARCIA (“Plaintiff”) will and
5 hereby does move the Court for an order granting final approval of the JOINT
6 STIPULATION OF CLASS ACTION AND PAGA ACTION SETTLEMENT AND
7 RELEASE (“Agreement” or “Stipulation” herein) reached with Defendants Praxair, Inc.
8 and Praxair Distribution, Inc. (“PDI”) (together, “Defendants” or “Praxair”), a true and
9 correct copy of which is attached as Exhibit 1 to the Declaration of H. Scott Leviant
10 submitted herewith. Specifically, Plaintiff moves for an order to:

- 11 1. grant approval of the terms of the Agreement as fair, reasonable and
12 adequate under Rule 23(e) of the Federal Rules of Civil Procedure, including the
13 amount of the settlement; the amount of distributions to class members; and the
14 amounts allocated to the enhancement payments and attorney’s fees and costs;
- 15 2. certify for settlement purposes the Settlement Class described in the
16 Agreement as follows: All persons who worked for Defendant PDI in California as
17 an hourly paid, non-exempt employee at any time, excluding truck drivers, during
18 the Class Period (from May 18, 2014, through Preliminary Approval).
- 19 3. appoint Plaintiff as representative for the Settlement Class;
- 20 4. Appointing counsel for Plaintiff, Moon & Yang, APC, as Class Counsel;
- 21 5. approve the use of ILYM Group, Inc. as the settlement administrator;
- 22 6. authorize distributions from the common fund; and,
- 23 7. enter judgment on the terms specified in the Agreement and approved by
24 the Court.

25 Plaintiff’s motion is based on this Notice, the following Memorandum of Points
26 and Authorities, the Declarations of H. Scott Leviant, ILYM Group, Inc., and Plaintiff
27 submitted herewith (the Declaration of Plaintiff was filed as Docket No. 63 and is also
28

1 attached as Exhibit 3 to the Leviant Declaration), all other pleadings and papers on file
2 in this action, and any oral argument or other matter that may be considered by the
3 Court.

4 This Motion is file in conjunction with Plaintiff's related motion for an award of
5 attorney's fees and litigation costs.

6
7
8 Dated: December 9, 2020

Respectfully submitted,

MOON & YANG, APC

9
10 By:  _____

11 Kane Moon
H. Scott Leviant

12 Attorneys for Plaintiff RITA GARCIA
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1 **I. INTRODUCTION**

2 This is a putative wage and hour class action on behalf of any and all individuals
3 employed by Defendant PDI in California during the Class Period (May 18, 2014 through
4 the date of preliminary approval of this Settlement by the Court), excluding truck drivers.
5 Plaintiff filed a lawsuit on behalf of all non-exempt employees of Defendant PDI in
6 California. The core issues in the case were based on allegations by Plaintiff that strict
7 rules imposed upon employees resulted in legally deficient meal and rest periods and time
8 under employer control that was not fully compensated. Defendants dispute these claims,
9 denies liability, and has vigorously defended the action to date.

10 After discovery, the exchange of additional informal data, and mediation, Plaintiff
11 and Defendants (Plaintiff and Defendants collectively referred to herein as the “Parties”)
12 reached a proposed class action settlement with a gross value of about \$929 per Class
13 Members for 536 participating Settlement Class Members (the Class Settlement Amount is
14 \$500,000). On July 17, 2020, this Court Preliminarily approved the Settlement, and the
15 Notice process was then completed successfully.

16 The Parties believe the Settlement to be fair and reasonable, to adequately reflect the
17 potential liability, and to be the result of thorough factual and legal analyses and arms-
18 length negotiations. Through this Motion, Plaintiff requests certification of a Settlement
19 Class pursuant to Fed. R. Civ. P. 23 and final approval of the proposed class action
20 settlement.

21 **II. THE NOTICE PROCESS WAS SUCCESSFULLY COMPLETED AFTER**
22 **PRELIMINARY APPROVAL**

23 The Parties have fulfilled the class notice procedures set forth in the Court’s
24 Preliminary Approval Order and the Class Members’ responses have been
25 overwhelmingly positive. The claims administrator, ILYM Group, Inc. (“Settlement
26 Administrator” or “ILYM”), sent individual notices to 538 Class Members on August 14,
27 2020. (Declaration of Makenna Snow (“Snow Decl.”), ¶ 7.) The list of Class Members
28 utilized by ILYM was prepared by (1) obtaining a list of Class Members from Defendant,

1 and (2) updating all addresses through the National Change of Address System. (Snow
2 Decl., ¶¶ 5-6.) ILYM mailed the Notice to 538 class members, based on the data
3 described above. (Snow Decl., ¶¶ 5-7.) Address traces were performed and updated
4 addresses were obtained for 18 of the 26 returned packets. (Snow Decl., ¶¶ 8-9.) Seven
5 Notices were undeliverable because current addresses could not be located even after using
6 consumer databases to search for current addresses. (Snow Decl., ¶ 10.) The best Notice
7 practicable was provided.

8 *No* Class Members have objected to the settlement. (Snow Decl., ¶ 12.) Only two
9 Class Members submitted valid requests for exclusion. (Snow Decl., ¶ 11.) ILYM’s costs
10 for administration will be \$13,000.00. (Snow Decl., ¶ 15.) Note that, in the Snow
11 Declaration, the estimated payments to Settlement Class Members in Paragraph 14 are out
12 of the Net Settlement Amount, not the Gross Settlement Amount, such that the reference to
13 “the average gross payment” refers to the pre-tax average out of the Net Settlement
14 Amount, the amount after all other deductions, not the Gross Settlement Amount.

15 **III. BACKGROUND**

16 **A. The Filing of the Action**

17 On May 18, 2018, Plaintiff filed a lawsuit in California state court on behalf of all
18 non-exempt, hourly paid employees of Defendant in California. (Declaration of H. Scott
19 Leviant [“Leviant Decl.”], at ¶ 4.) The Complaint asserted claims for: (i) unpaid minimum
20 and straight time wages; (ii) unpaid overtime; (iii) meal and rest break violations; (iv)
21 failure to timely pay wages upon termination; (v) wage statement violations; and, (vi)
22 derivative claims under Business & Professions Code §§ 17200, *et seq.* On September 9,
23 2019, by Stipulation, Plaintiff filed a First Amended Complaint adding a claim for Civil
24 Penalties Under PAGA (Cal. Lab. Code § 2699, *et seq.*).

25 Defendants removed the matter to federal court (Northern District) on June 28,
26 2018. (Leviant Decl., at ¶ 5.) The matter was Ordered transferred to the Central District on
27 September 18, 2018. (*Id.*)
28

1 **B. Discovery, Settlement Negotiations, and Settlement**

2 The Parties have conducted significant investigation of the facts and law during the
3 prosecution of this Litigation. (Leviant Decl., at ¶ 6.) Such investigation has included
4 formal written discovery; informal data provided as part of the pre-mediation exchange of
5 information; and, numerous communications between the Parties to identify and assess the
6 issues. (*Id.*) The Parties have further investigated the applicable law as applied to the facts
7 discovered regarding the alleged claims of Plaintiff and potential defenses thereto, and the
8 damages claimed by Plaintiff. (*Id.*) The filing of a Motion for Class Certification and the
9 Opposition thereto further assisted the Parties with the evaluation of the claims and risks
10 each Party faced.

11 The Parties mediated this matter before professional mediator Jeffrey Krivis on May
12 15, 2019 in Encino, California. (Leviant Decl., at ¶ 7.) The matter did not settle at the
13 mediation, but the Parties continued to negotiate with the assistance of Mr. Krivis. (*Id.*)
14 The Parties subsequently agreed to the basic terms of settlement. (*Id.*)

15 The Parties then prepared and signed a long form settlement agreement (the
16 Agreement). (Leviant Decl., at ¶ 8.) The Settlement was reached after evaluating the
17 Parties' theories of potential exposure for the underlying claims, as well as Plaintiff's
18 claims for interest and penalties. The Parties also assessed appropriate discounts to the
19 potential liability based on Defendants' contentions and defenses. (*Id.*) Plaintiff and Class
20 Counsel are aware of the burdens of proof necessary to establish liability for the claims in
21 the Action, both generally and in response to Defendant's defenses thereto. (*Id.*)

22 Based on their own independent investigations and evaluations, Class Counsel are
23 of the opinion that the Settlement for the consideration and terms set forth below, in view
24 of the Class Representatives' and average Class Member's claims and the risk of loss, is
25 fair, reasonable, and adequate in light of all known facts and circumstances, and is in the
26 best interests of the Class. (Leviant Decl., at ¶ 9.) Class Counsel are also of the opinion
27 that the total consideration and payment set forth in this Agreement is adequate in light of
28 the uncertainties surrounding the risk of further litigation and the defenses that Defendants

1 has asserted and could assert. (*Id.*)

2 Solely for the purpose of settling this case, the parties agree that the requirements
3 for establishing class action certification with respect to this class have been met and are
4 met. (Leviant Decl., at ¶ 10.) If this Settlement is not approved by the Court for any
5 reason, Defendants reserve the right to contest class certification. (*Id.*) This Settlement, if
6 approved by the Court, will result in the termination with prejudice of the litigation
7 through the entry of the Judgment and the release of all released claims for all Class
8 Members, including all within the class definition who have not elected to exclude
9 themselves from the Settlement Class. (*Id.*)

10 **IV. SUMMARY OF SETTLEMENT TERMS**

11 The full terms of the settlement are set forth in the Agreement. The primary
12 material terms are as follows:

- 13 (a) The Settlement Class is: All persons who worked for Defendant PDI
14 in California as an hourly paid, non-exempt employee at any time,
15 excluding truck drivers, during the Class Period (from May 18, 2014,
16 through Preliminary Approval) (Settlement, ¶ 8.)
- 17 (b) Defendants stipulate to certification of a Settlement Class for purposes
18 of Settlement only;
- 19 (c) Settlement Amount: Defendants will pay a maximum of \$500,000.00,
20 referred to as the Class Settlement Amount (or CSA herein)
21 (Settlement, ¶ 10);
- 22 (d) No Reversion: The Settlement is a non-reversionary settlement
23 (Settlement, ¶ 2);
- 24 (e) No Claim Form Required: No claim for is required for a Class
25 Member to receive the Class Member's settlement share. (Settlement,
26 ¶ 17);
- 27 (f) Release: The Settlement will release specified wage-and-hour claims
28 for those Settlement Class Members who do not opt out of the

Settlement, based upon or arising from the claims asserted against Defendants in the Action;

- (g) Net Settlement Amount Available to the Class: After deducting Class Counsels' proposed attorneys' fees and costs, enhancement payment to Plaintiff, Administration costs, and the payment to the LWDA, the remainder will be available for distribution to Settlement Class Members who do not opt out, with each Settlement Class Member receiving a share based on the number of workweeks each Settlement Class Member worked for Defendants within the Settlement Class Period. The Net Settlement Amount is estimated to be \$304,500, and each of the approximately 480 Class Members will receive, on average, up to \$634, after all deductions but before any tax withholdings (Settlement, ¶¶ 5, 9, 10, 18);
- (h) Tax Allocation: The amounts distributed to Settlement Class Members will be characterized as one-third unpaid wages and meal and rest premiums, and two-thirds as alleged unpaid penalties and interest (Settlement, ¶ 68);
- (i) Employer's Portion of Payroll Taxes Paid Separately: Defendant's portion of payroll taxes (e.g., FICA, FUTA, etc.) owed on any settlement payments to Settlement Class Members that constitute wages will be paid separate and apart from the GSM (Settlement, ¶ 10);
- (j) Cy Pres: Any settlement checks that are mailed to the Settlement Class Members and remain uncashed after 180 days of the date of issuance will be cancelled, and the moneys will be directed to the cy pres, State Bar's Justice Gap Fund, or other recipient as directed by the Court (Settlement, ¶ 66);

- (k) Administration: The notice portion of the Settlement will be administered by a third-party Administrator, ILYM Group, Inc., and costs of administration are estimated to be no more than \$13,000 (Settlement, ¶ 5);
- (l) PAGA Allocation: From the CSA, \$37,500 will be paid to the California Labor & Workforce Development Agency to resolve and settle claims brought pursuant to the California Private Attorneys General Act, Labor Code § 2699 et seq. (“PAGA”), representing 75% of the \$50,000 allocated to resolve claims arising under PAGA. (Settlement, ¶ 18);
- (m) Enhancement/Service Award to Plaintiff: Defendants will not oppose the application for Class Representative Enhancement of up to \$5,000.00 for Plaintiff, to be paid from the CSA. (Settlement, ¶ 46);
- (n) Fees and Costs: Defendant will not oppose Class Counsel’s application for fees up to the amount of \$125,000.00 (25% of the GSA), and actual costs, in an amount not to exceed \$15,000, to be paid out of the GSA. (Settlement, ¶ 45.)

(Leviant Decl., ¶ 11-12.) A true and correct copy of the JOINT STIPULATION OF CLASS ACTION AND PAGA ACTION SETTLEMENT AND RELEASE is attached thereto as Exhibit “A.”

V. CLASS DEFINITION

The Settlement Class is defined as follows:

All persons who worked for Defendant PDI in California as an hourly paid, non-exempt employee at any time, excluding truck drivers, during the Class Period (from May 18, 2014, through Preliminary Approval) (Settlement, ¶ 8.)

(Leviant Decl., ¶ 34 and Exhibit 1.)

1 **VI. THE SETTLEMENT MERITS FINAL APPROVAL**

2 The law favors settlement, particularly in class actions and other complex cases,
3 where substantial resources can be conserved by avoiding the time, cost, and the rigors of
4 formal litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).
5 These concerns apply in a case such as this, where allegedly wrongful practices potentially
6 affected numerous employees, in relatively small amounts.

7 Any settlement of class litigation must be reviewed and approved by the court. This
8 is done in two steps: (1) an early (preliminary) review by the court, and (2) a final review
9 after notice has been distributed to the class for their comment or objections. The *Manual*
10 *for Complex Litigation Second* states at § 30.44 (1985):

11 A two-step process is followed when considering class settlements ... if
12 the proposed settlement appears to be the product of serious, informed,
13 non-collusive negotiations, has no obvious deficiencies, does not
14 improperly grant preferential treatment to class representatives or
15 segments of the class, and falls within the range of possible approval, then
16 the court should direct that notice be given to the class members of a
17 formal fairness hearing, at which evidence may be presented in support of
18 and in opposition to the settlement.

19 When parties reach a settlement agreement prior to class certification, “courts must peruse
20 the proposed compromise to ratify both the propriety of the certification and the fairness of
21 the settlement.” *Acosta v. Trans Union LLC*, 243 F.R.D. 377, 383 (C.D. Cal. 2007).

22 “The first step is a preliminary, pre-notification hearing to determine whether the
23 proposed settlement is ‘within the range of possible approval.’ This hearing is not a
24 fairness hearing; its purpose, rather is to ascertain whether there is any reason to notify the
25 class members of the proposed settlement and to proceed with a fairness hearing.”
26 *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (6th
27 Cir. 1980) [quoting *Manual for Complex Litigation* s 1.46, at 53-55 (West 1977)]. “[T]he
28 district court must assess whether a class exists,” *Staton v. Boeing Co.*, 327 F.3d 938, 952

(9th Cir. 2003), *i.e.*, whether the lawsuit qualifies as a class action under Rule 23. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (reviewing settlement to ensure compliance with requirements of Rule 23(a) and Rule 23(b)(3)).

At the second stage of the approval process, after class members have had an opportunity to object to the settlement, the court makes a final determination whether the settlement is “fair, reasonable and adequate” under Rule 23(e). *Armstrong*, 616 F.2d at 314; *see Staton*, 327 F.3d at 952; *see also* Rule 23(e)(C)(1), which provides that a court may finally approve a settlement of a class action if it finds after a hearing that the settlement is “fair, reasonable, and adequate” and Rule 23(e)(C)(4), which provides that any class member may object to a proposed settlement.

A. Plaintiff’s Claims Merit Class Action Treatment

In determining the propriety of class certification, a court may not delve into the underlying merits of the claims. The fundamental question “is not whether . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

The Ninth Circuit has established that, when ruling on the propriety of class certification, a district court “is bound to take the substantive allegations of the complaint as true.” *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). A court “may not require plaintiffs to make a preliminary proof of their claim; it requires only sufficient information to form a reasonable judgment.” *Baldwin & Flynn v. Nat’l. Safety Associates*, 149 F.R.D. 598, 600 (N.D. Cal. 1993). Under these standards, this action meets the requirements for certification under Rule 23(a) and Rule 23(b)(3).

1. Numerosity

Under Rule 23(a)(1), a class action may be maintained where “the class is so numerous that joinder of all members is impracticable.” In determining whether joinder would be impracticable, a court may consider not only the sheer number of class members, *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (numbers alone may be

dispositive), but also “the nature of the action, the size of the individual claims, [and] the inconvenience of trying individual suits.” *Wang v. Chinese Daily News*, 231 F.R.D. 602, 606 (C.D. Cal. 2005). “A class action may proceed upon estimates as to the size of the proposed class.” *Lewis v. Gross*, 663 F. Supp. 1164, 1169 (E.D.N.Y. 1986). *See also, In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 679 (N.D. Cal. 1986) (class certified where plaintiffs did not establish exact size, but demonstrated that class would “obviously be sufficiently numerous”).

In this action, the Class is composed of 536 individuals. (Snow Decl., ¶¶ 7-11.) It is sufficiently numerous that the individual joinder of all members is impracticable.

2. Commonality and Predominance of Common Issues

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” This commonality requirement is “construed permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Plaintiff need not demonstrate that all questions of fact and law are common. “The existence of shared legal issues with divergent factual predicates is sufficient.” *Id.* Where a class is united by a common interest in determining whether a defendant’s broad course of conduct is actionable, commonality is not defeated “by slight differences in class members’ positions.” *Blackie*, 524 F.2d at 901 n.17.

In this litigation, all Class Members have shared a common interest in determining whether policies and procedures resulted in legally deficient meal periods and rest breaks for Class Members; whether policies and procedures resulted in uncompensated time under the employer’s control; whether, as a result of these issues, the Defendant violated the itemized wage statement provisions of Labor Code § 226 by not providing accurate information as to wages; and whether the Defendant’s policies and practices violated California Business & Professions Code sections 17200 *et seq.*

Given the permissive standard that courts in the Ninth Circuit employ when determining commonality, certification of the Class for settlement purposes is appropriate as Rule 23(a)(2) is satisfied.

Once it is established that common issues of law or fact exist, for Rule 23(b)(3)

1 purposes, the Court next examines whether those common issues predominate. The
2 predominance inquiry focuses on whether the class is “sufficiently cohesive to warrant
3 adjudication by representation.” *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*,
4 244 F.3d 1152, 1162 (9th Cir. 2001). Central to predominance is “the notion that the
5 adjudication of common issues will help achieve judicial economy.” *Zinser v. Accufix*
6 *Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th Cir. 2001). When common questions
7 represent a significant aspect of the case and they can be resolved for all members of the
8 class in a single adjudication, there is clear justification for handling the dispute on a
9 representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022. It is well
10 settled that the need for determining differing amounts of damages suffered by different
11 class members does not preclude class certification. *See, Blackie*, 524 F.2d at 905; *Wang*,
12 231 F.R.D. at 613.

13 There are common issues that may predominate over individual issues in this
14 litigation. For example: (1) Whether policies and procedures resulted in legally deficient
15 meal periods and rest breaks for Class Members; (2) Whether policies and procedures
16 resulted in uncompensated time under the employer’s control; (3) Whether, as a result of
17 these issues, Defendants violated the itemized wage statement provisions of Labor Code §
18 226 by not providing accurate information as to wages; (4) Whether, as a result of these
19 issues, Defendants violated the payment timing provisions of Labor Code § 203 by not
20 timely paying all wages due to former employees; and (5) Whether the Defendants’
21 policies and practices violated California Business & Professions Code §§ 17200 *et seq.*

22 3. Typicality

23 Rule 23(a)(3) requires that the representative plaintiff have claims “typical of the
24 claims . . . of the class.” This factor is also construed permissively. *See Hanlon*, 150 F.3d
25 at 1019-20. Representative claims are typical “if they are reasonably co-extensive with
26 those of absent class members; they need not be identical.” *Id.* at 1020. In other words,
27 named plaintiffs need not be “identically situated” with all other class members. “It is
28 enough if their situations share a common issue of law or fact and are sufficiently parallel

1 to insure a vigorous and full presentation of all claims for relief.” *Cal. Rural Legal*
2 *Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990).

3 Typicality refers to the “nature of the claim . . . of the class representative, and not
4 to the specific facts from which it arose.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
5 508 (9th Cir. 1992). The typicality requirement is satisfied where “the named Plaintiffs
6 raise the same Labor Code violations as other putative class members.” *Id.* Here, Plaintiff
7 is raising the same claims as the putative class members. (Leviant Decl., ¶ 36.)

8 **4. Adequate Representation**

9 Rule 23(a)(4) requires that “the representative parties will fairly and adequately
10 protect the interests of the class.” Adequate representation turns on whether the named
11 plaintiff and his counsel “have any conflicts of interest with other class members,” and
12 whether the named plaintiff and his counsel will “prosecute the action vigorously on behalf
13 of the class.” Adequacy may be established by the mere fact that counsel are experienced
14 practitioners. *Hanlon*, 150 F.3d at 1020.

15 There are no conflicts of interest between Plaintiff and Class Members, and Plaintiff
16 has both shown and expressed a willingness to represent Class Members. (Dkt. No. 63:
17 Garcia Decl., ¶ 4-17, attached as Exhibit 3 to the Leviant Decl.) The similarity of the
18 claims asserted and remedies sought by Class Members and Plaintiff do not suggest any
19 divergent interests held by Plaintiff. Defendant did not assert unique defenses against
20 Plaintiff that it could not assert against any other Class Members. Also, there are no
21 conflicts with Plaintiff’s counsel.

22 Plaintiff’s counsel has substantial class action experience and can adequately
23 represent the Class. They have been appointed class counsel in many wage and hour class
24 actions against major employers. (Leviant Decl., ¶¶ 21-26, 39.) Plaintiff’s counsel has
25 included detailed information about experience in the field of class action litigation and
26 wage and hour suits in particular.

27 **5. Superiority**

28 In deciding whether to certify a class for settlement purposes, a court considers the

1 following factors to determine whether a class action is superior: (a) class members’
2 interests in individually controlling the prosecution or defense of separate actions; (b) the
3 extent and nature of any litigation concerning the controversy already commenced by or
4 against members of the class; and (c) the desirability or undesirability of concentrating the
5 litigation of the claims in the particular forum.¹ Some courts have found that the third
6 Rule 23(b)(3) factor is “conceptually irrelevant in the context of a settlement.” See *Strube*
7 *v. American Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005). “With the
8 settlement in hand, the desirability of concentrating the litigation in one forum is obvious.”
9 *Elkins v. Equitable Life Ins. Of Iowa*, 1998 WL 133747, at *19 (M.D. Fla. 1998).

10 To determine whether the superiority requirements of Rule 23(b)(3) are satisfied, a
11 court compares a class action with alternative methods for adjudicating the parties’ claims.
12 Lack of a viable alternative to a class action necessarily means that it satisfies the
13 superiority requirement. See *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir.
14 1996) (“a class action is a superior method for managing litigation if no realistic alternative
15 exists”). “[I]f a comparable evaluation of other procedures reveals no other realistic
16 possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied.”
17 *Culinary/Bartender Trust Fund*, 244 F.3d at 1163. In *Culinary/ Bartender Trust Fund*, the
18 Ninth Circuit held that the “case involve[d] multiple claims for relatively small sums” and
19 that the class action clearly served as the only method that would ““permit the plaintiffs to
20 pool claims which would be uneconomical to litigate individually.”” *Id.* at 1163.

21 The class action is superior here as it is on the only method that will allow Class
22 Members “to pool [their individual] claims which would be uneconomical to litigate
23 individually.” *Id.*

24 The factors articulated in Rule 23(b)(3)(A), (B) and (C) also favor class
25

26 ¹ Rule 23(b)(3)(A)-(C). When a court reviews a class action settlement, it does *not*
27 consider Rule 23(b)(3)(D), the fourth factor, regarding difficulties of managing a class
28 action. *Amchem Products Inc. v. Woodward* (1997) 521 U.S. 591, 620 (in deciding
whether to certify a class for settlement purposes, a district court “need not inquire
whether the case, if tried, would present intractable management problems”).

1 certification. It is difficult to believe that any Class Members have an interest in
2 individually controlling the prosecution of separate actions, given the relatively small sums
3 involved for any one Class Member. Any Class Member who wanted to pursue a separate
4 action could opt out of the Settlement, and only two did.

5 Also, it is desirable to concentrate issues in one forum. The Settlement allows all
6 individuals to resolve similar claims against Defendant through a process that does not
7 even require a claim form.

8 **B. The Settlement Falls Squarely Within the Range of Reasonableness and**
9 **Should Be Finally Approved**

10 No single criterion determines whether a class action settlement meets the
11 requirements of Rule 23(e). The Ninth Circuit has directed district courts to consider a
12 variety of factors without providing an “exhaustive list” or suggesting which factors are
13 most important. *See, Staton*, 327 F.3d at 959. “The relative degree of importance to be
14 attached to any particular factor will depend upon and be dictated by the nature of the
15 claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances
16 presented by each individual case.” *Officers for Justice v. Civil Service Commission of*
17 *City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

18 Due to the impossibility of predicting any litigation result with certainty, a district
19 court’s evaluation of a settlement essentially amounts to “an amalgam of delicate
20 balancing, gross approximations and rough justice.” *Id.* at 625. The ultimate touchstone,
21 however, is whether “class counsel adequately pursued the interests of the class as a
22 whole.” *Staton*, 327 F.3d at 961.

23 As the Ninth Circuit explained in *Officers for Justice*, the district court’s role in
24 evaluating a class action settlement is therefore tailored to meet that narrow objective.
25 *Officers for Justice*, 688 F.2d at 625. Review under Rule 23(e) “must be limited to the
26 extent necessary to reach a reasoned judgment that the agreement is not the product of
27 fraud or overreaching by, or collusion between, the negotiating parties.” *Id.* Accordingly,
28 the Ninth Circuit will not reverse a district court’s approval of a class action settlement

1 “unless the fees and relief provisions clearly suggest the possibility that class interests gave
2 way to self interest.” *Staton*, 327 F.3d at 961.

3 There is a presumption that the negotiations were conducted in good faith.
4 Newberg, §11.51; *Pridd v. Edelman*, 883 F.2d 438, 447 (6th Circuit 1989); *Mars Steel*
5 *Corp. v. Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 682 (7th Cir.
6 1987). Courts do not substitute their judgment for that of the proponents, particularly
7 where, as here, settlement has been reached with the participation of experienced counsel
8 familiar with the litigation. *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *In re*
9 *Armored Car Anti-Trust Litigation*, 472 F. Supp. 1357 (N.D. GA 1979); *Sommers v.*
10 *Abraham Lincoln Federal Savings & Loan Association*, 79 F.R.D. 571 (E.D. PA 1978).
11 The fact that settlement results from arms-length negotiations following “relevant
12 discovery” creates “a presumption that the agreement is fair.” *Linney v. Cellular Alaska*
13 *Partnership*, 1997 WL 450064, *5 (N.D. Cal. 1997); *See In re Immune Response*
14 *Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (settlement approved
15 where informal discovery gave the parties a clear view of the strength and weaknesses of
16 their cases).

17 Here, the Parties reached a non-collusive settlement after months of negotiations.
18 The settlement was finally reached after an arm’s length mediation before Jeffrey Krivis, a
19 highly-respected mediator skilled at helping parties attempting to negotiate reasonable
20 settlements in wage and hour class actions. Obtaining class certification and establishing
21 liability posed significant hurdles for the class that justified the settlement. The Agreement
22 falls well within the range of reasonable outcomes and merits approval under Rule 23(e).
23 (Leviant Decl., ¶¶ 7, 10, 12-19.)

24 **1. The Value of the Settlement to Class Members Is Fair, Reasonable**
25 **and Adequate**

26 The Parties reached a Settlement in good faith after negotiating at arm’s length with
27 a professional mediator. (Leviant Decl., ¶ 7.) Settlement occurred only after substantial
28 discovery was conducted and additional, relevant information was shared prior to

1 mediation. The information exchanged was sufficient to permit Plaintiff's counsel to
2 adequately evaluate the settlement. And, notably, approval of a class action settlement
3 does not require that discovery be formal or exhaustive (though it was here). *See, e.g., In*
4 *re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007)
5 (settlement approved where informal discovery gave the parties a clear view of the
6 strength and weaknesses of their cases). The fact that settlement results from arms length
7 negotiations following "relevant discovery" creates "a presumption that the agreement is
8 fair." *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, at *5 (N.D. Cal. 1997).

9 With respect to the claims asserted on behalf of the Settlement Class in this case,
10 there are significant risks that support the reduced compromise amount. These risks
11 include, but are not limited to: (i) the risk that Plaintiff would be unable to establish
12 liability for allegedly unpaid straight time or overtime wages, *see Duran v. US Bank Nat'l*
13 *Ass'n*, 59 Cal. 4th 1, 39 & fn. 33 (2014) ("*Duran*"), *citing Dilts v. Penske Logistics, LLC*
14 2014 WL 205039 (S.D. Cal. 2014) (dismissing certified off-the-clock claims based on
15 proof at trial); (ii) the risk that Defendants' challenged employment policies might not
16 ultimately support class certification or a class-wide liability finding, *see, Duran*, 59 Cal.
17 4th at 14 & fn. 28 (citing Court of Appeal decisions favorable on class certification issue
18 without expressing opinion as to ultimate viability of proposition); (iii) the risk that
19 uncertainties pertaining to the ultimate legality of Defendants' policies and practices could
20 preclude class-wide awards of statutory penalties under Labor Code §§ 203 and 226(e);
21 (iv) the risk that individual differences between Settlement Class Members could be
22 construed as pertaining to liability, and not solely to damages, *see, Duran*, 59 Cal. 4th at
23 19; (v) the risk that class treatment could be deemed improper as to one or more claims
24 except for settlement purposes; (vi) and the risk that lengthy appellate litigation could
25 ensue. Defendants strongly deny any liability and the propriety of class certification for
26 any reason other than settlement. (Leviant Decl., ¶ 16.) Continued litigation of this
27 lawsuit presented Plaintiff and Defendants with substantial legal risks that were (and
28 continue to be) very difficult to assess.

1 In light of the uncertainties of protracted litigation, the settlement amount reflects a
2 fair and reasonable recovery for the Settlement Class Members. (Leviant Decl. ¶¶ 13-19.)
3 The settlement amount is, of course, a compromise figure. (Leviant Decl. ¶ 17.) By
4 necessity it took into account risks related to liability, damages, and all the defenses
5 asserted by the Defendant. (*Id.*) Moreover, each Settlement Class Member will be given
6 the opportunity to opt out of the Settlement, allowing those who feel they have claims that
7 are greater than the benefits they can receive under this Settlement, to pursue their own
8 claims. (*Id.*) For the 536 participating members of the Class, the average *gross* recovery
9 before deductions for taxes, fees, and other costs, is approximately \$929 per class member.
10 (Leviant Decl., ¶ 17.) The value of this amount reflects a fair compromise well within the
11 range of reasonableness. Given the strong case that Defendants could bring to bear to
12 challenge certification and liability, this is not an inconsequential sum. And, confirming
13 the fundamental fairness of the settlement, each Class Member will be compensated
14 ratably based on the number of workweeks they worked during the class period. (*Id.*)

15 The Class Settlement Amount is fully consistent with any risk at this stage in the
16 litigation. While Plaintiff would certainly have preferred to recover even more (and
17 Defendant would have preferred to pay far less or zero), this outcome is in line with a
18 carefully constructed estimate of the current fair value of the case. (Leviant Decl., ¶ 18.)
19 On that basis, it would be unwise to pass up this settlement opportunity. Again, the
20 settlement amount falls *within* the statutory damages range, not below it. (*Id.*)

21 After analyzing the claims in this matter, Plaintiff has concluded that the value of
22 this Settlement is fair, adequate and reasonable. For example, a reasonably estimated
23 exposure for unpaid wages due to off the clock work over the class period was calculated,
24 with the assistance of an expert, to be approximately \$748,832. However, with the risk
25 factor discounts for certification and liability, the value of that claim is estimated to be
26 approximately \$74,883, assuming certification probability of 25% and merits success at
27 40%. The reasonably estimated exposure for meal break violations over the class period
28 was calculated at \$668,351, with discounts of certification and liability risks (20% and

30% respectively) resulting in a risk-adjusted exposure of \$80,202. Performing risk-adjusted valuations for all claims yields a total value in the range of roughly \$480,000 – \$550,000, compared to an unreduced estimated exposure of approximately \$2,500,000.² (Leviant Decl., ¶¶ 18, 18(g).) The goals of this litigation have been met. (Leviant Decl., ¶ 18, and subparagraphs.)

Considering the statutory framework and risks, this result here is fully supportable as reasonable. (Leviant Decl., ¶ 19.) Certification rates are lower than conventional wisdom holds. *See, e.g.,* H. Scott Leviant, *Second Interim Report on class actions in California sheds new light on certification* (February 19, 2010), [www.thecomplexlitigator.com](http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html), available at <http://www.thecomplexlitigator.com/post-data/2010/2/19/second-interim-report-on-class-actions-in-california-sheds-n.html>; *see also*, *Findings of the Study of California Class Action Litigation, 2000-2006*, available at <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf> (finding, as part of a study conducted by the Judicial Council of California, at page 5, and in Table 9, at page 15, that only 21.4% of all class actions were certified either as part of a settlement *or* as part of a contested certification motion). In estimating risk adjustments here, Plaintiff’s counsel has assumed estimated certification probabilities of 20% - 30%, depending on the claim, assumptions that substantially *exceed* the average rate at which cases were certified in California over the study years, based upon data available through the California Courts website. (*Id.*) Given that well under 20% of all cases filed in California as proposed class actions are ultimately certified by way of a contested motion,

² In a sense, it is nonsensical to assign specific percentages to future events, but it does provide a specific method for attempting to reduce the concept of “very high risk” or “high risk” to a quantifiable amount. Certification of a claim is typically a binary event. One does not obtain a 20% certification; a claim is either certified or it is not. But the current expected value is best quantified by applying a risk reduction, based on the total experience of counsel. Setting aside the math, it is fair to say that Plaintiff and the putative class faced very high risks proceeding to a contested certification motion and (in the best-case outcome) a trial thereafter, given that Defendants credibly argued (in varying degrees) that certification should be denied as to some or all facilities, job categories, or claims and that Plaintiff would have difficulty prevailing on the merits on all claims.

1 and a similar trend is seen in federal courts, it is fair to say that, if anything, the use of high
2 estimates for certification *overstates* the realistic current claim value. (*Id.*) It would also
3 be appropriate to evaluate the result by examining only the premium wages at issue,
4 excluding penalties and interest.³ Under that metric, the settlement recovered a substantial
5 portion of those premium wages. Viewed either way, this Settlement achieves the goals of
6 the litigation.

7 By obtaining reasonable value for the claims in light of the high risks of litigation,
8 Plaintiff achieved a fair settlement that merits approval.

9 2. The PAGA Allocation

10 Plaintiff's estimate of the theoretical recovery on the PAGA claim is \$791,112.
11 (Leviant Decl. ¶ 18(e)(4).) This estimate does not limit the penalty to the assumption that
12 the \$100 initial violation pay period would apply to all pay periods as there is no evidence
13 that a court or a commissioner had informed Defendant that its conduct violated the Labor
14 Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v. Xerox Bus.*
15 *Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013): "Under California law, courts
16 have held that employers are not subject to heightened penalties for subsequent violations
17 until and unless a court or commissioner notified the employer that it is in violation of the
18 Labor Code." Instead, the maximum possible penalty was calculated, based on data and,
19 where no data exists, the extrapolations and assumptions used to evaluate all claims.

20 The PAGA allocation is a small percentage of the possible exposure but that is
21 permissible in this case because the settlement of the underlying wage and hour claims is
22 adequate to serve the deterrent purpose of the PAGA statute. *O'Connor v. Uber*

23
24 ³ The exclusion of interest and penalties from the fairness evaluation is proper
25 because, first, PAGA penalties are discretionary (*see* Lab. Code § 2699(e)(2) (the court in
26 its discretion "may award a lesser amount than the maximum civil penalty amount
27 specified by this part...")), and, second, courts evaluate the strength of a proposed
28 settlement without taking potential penalties or interest into consideration. *See Rodriguez*
v. West Publishing Corp., 563 F.3d 948, 955 (9th Cir. 2000); *see also Miller v. CEVA*
Logistics U.S.A., Inc., 2015 WL 729638, at *7 (E.D. Cal. Feb. 19, 2015) (court utilized
calculation of a defendant's exposure exclusive of interest and penalties to determine
whether the settlement fell within the range of possible approval).

1 *Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016): “By providing fair
2 compensation to the class members as employees and substantial monetary relief, a
3 settlement not only vindicates the rights of class members as employees, but may have a
4 deterrent effect upon the defendant employer and other employers, an objective of
5 PAGA.” *See also Viceria v. Mistras Group*, 2016 WL 5907869 *9 (N.D. Cal. 2016):
6 “Applying O’Connor’s sliding scale approach, settlement of the PAGA claim may be
7 substantially reduced below its standalone settlement value without sacrificing its statutory
8 purposes because the non PAGA settlement is relatively substantial.” In addition, Plaintiff
9 has allocated *more* of the Settlement, as a percentage, to PAGA than is usual in wage and
10 hour settlements of combined class and PAGA claims.

11 **3. The Agreed Upon Fees and Costs Are Reasonable**

12 **a) Plaintiff seeks reasonable fees.**

13 While a separate Motion addresses Plaintiff’s requests for attorney’s fees, costs, and
14 an enhancement award, Plaintiff briefly addresses the reasonableness of the amounts
15 below.

16 The compensation sought for Plaintiff’s counsel is also fair and reasonable. The
17 Ninth Circuit has directed that, to determine what constitutes a fair and reasonable
18 percentage of the settlement for purposes of calculating common fund attorneys’ fees, the
19 courts should begin with a “benchmark” percentage of the total fund. *Paul, Johnson,*
20 *Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Vizcaino v. Microsoft Corp.*,
21 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904
22 F.2d 1301, 1311 (9th Cir. 1990). The percentage can be adjusted upwards where the risks
23 overcome, the benefits obtained and the work necessary to achieve those results supports
24 such an adjustment of the benchmark.

25 Here, the Settlement Amount is \$500,000. Plaintiff’s counsel has agreed to seek no
26 more than **\$125,000.00** in fees, which is appropriate in light of the quality of the result and
27
28

1 the benchmark standard, and is well under the current lodestar of \$148,994.50.⁴ (Leviant
2 Decl., ¶ 31.)

3 b) *Plaintiff seeks only actual costs.*

4 Plaintiff's counsel also requests actual costs incurred and paid without
5 reimbursement in the litigation of this Action, not to exceed \$15,000. Those costs are
6 **\$10,369.91**, as supported by the Declaration of H. Scott Leviant attaching a summary of
7 incurred costs as Exhibit "4". (Leviant Decl., ¶¶ 44, 47 and Exhibit 4.)

8 **4. The Enhancement Award Is Reasonable**

9 Enhancement awards serve to reward the named plaintiff for the time and effort
10 expended on behalf of the class, and for exposing herself to the significant risks of
11 litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for
12 the services they provided and the risks they incurred during the course of the class action
13 litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001); *In re*
14 *Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). In *Coca-*
15 *Cola*, for example, the court approved incentive awards of \$300,000 to each named
16 plaintiff in recognition of the services they provided to the class by responding to
17 discovery, participating in the mediation process and taking the risk of stepping forward on
18 behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also Van Vranken v. Atl. Richfield*
19 *Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving \$50,000 award).

20 Here, Plaintiff's counsel requests that the Court grant Plaintiff an incentive award of
21 \$5,000. The amount of the enhancement award is reasonable given the risks undertaken
22 by Plaintiff. Taking the risk of filing a lawsuit against an employer deserves reward.
23 Additionally, Plaintiff was actively involved in the litigation and settlement negotiations of
24 this Action, including assisting Counsel to prepare for the mediation in this matter and
25 submitting to a full day of deposition. Plaintiff worked diligently with counsel to prepare
26

27 ⁴ While Plaintiff's Counsel has frequently obtained fee awards in excess of the
28 presumptive benchmark, Plaintiff's Counsel will seek no more than 25% of the CSA.

the action and conferred with counsel regarding settlement negotiations. (Dkt. No. 63: Garcia Decl., ¶ 4-16, attached as Exhibit 3 to the Leviant Decl.) And the requested enhancement is just five times the average gross recovery of a class member. The requested amount, based on a single digit multiplier, is reasonable.

5. The Costs of Administration Are Reasonable

ILYM Group, Inc., an experienced third-party administrator, was appointed to administer the notice and settlement distributions in this matter. (Snow Decl., ¶¶ 2-3.) Performing in all respects as required by the Agreement to date, the final cost of administration, including future work, is \$13,000.00. (Snow Decl., ¶ 12.) Administration of this Settlement for 536 Class Members occurred without any issues to date. (Leviant Decl., ¶ 33.) ILYM will continue to perform services for the Settlement Class Members when it completes the calculation and distribution of payments made under the Settlement. Plaintiff therefor requests approval of a distribution to ILYM Group, Inc. of \$13,000.00 as its fee for third-party administration services.

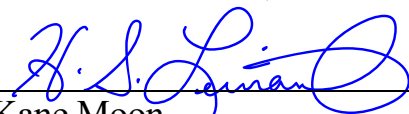
VII. CONCLUSION

Plaintiff negotiated a settlement that resolves claims and recovers money for approximately 536 Settlement Class Members. This settlement is fair and reasonable, especially given the claims and the potential defenses to them and to class certification. Plaintiff asks the Court to grant final approval of the settlement and adopt the proposed order submitted herewith.

Respectfully submitted,

Dated: December 9, 2020

MOON & YANG, APC

By: 
Kane Moon
H. Scott Leviant

Attorneys for Plaintiff RITA GARCIA